

Supreme Court, U. S.
FILED

JUL 24 1979

MICHAEL RUDAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1785

ROBERT GREGORY GROGAN, Et Al. - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

AND

CITY OF SOUTH GATE, KENTUCKY - Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The jurisdictional requisites are not adequately set forth in the petition. Petitioners invoke jurisdiction of this Court under 28 U.S.C. Sec. 1254 (2) and (3) to which the respondent Commonwealth of Kentucky objects. Under 28 U.S.C. Sec. 1254 (2), this Court lacks jurisdiction since the validity of a state statute has not been drawn into question on grounds it is repugnant to the Constitution of the United States or any

of its treaties or laws. This Court also lacks jurisdiction under 28 U.S.C. Sec. 1254 (3) because the petitioners' rights under the Constitution of the United States are not violated by the application of state tort law. Finally, this Court lacks jurisdiction because the issues presented in the petition were not presented to the Supreme Court of Kentucky.

QUESTIONS PRESENTED

- I. The Decision Below Was Based on State Law and Does Not Present a Federal Question.
- II. The Application of the Public Duty Doctrine by the Kentucky Supreme Court to the Commonwealth of Kentucky is Not Violative of the Equal Protection and Due Process Provisions of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved in this petition.

COUNTERSTATEMENT OF THE CASE

On the evening of May 28, 1977, a fire at the Beverly Hills Supper Club in Southgate, Kentucky claimed 165 lives and injured many.

As a result of the incident, a wrongful death action was filed within hours. Simultaneous suits, identical in nature, were filed in the United States District Court for the Eastern District of Kentucky and state court.

The federal actions numbered some 54 including four different class actions. The state actions numbered 50 including one class action and one action styled master complaint with 200 plaintiffs. Among the more than 1,000 defendants in these suits were the Commonwealth of Kentucky and certain state employees named in an individual capacity. In addition, 254 claims against the Commonwealth and its employees were filed in the Kentucky Board of Claims.

Motions to dismiss were filed by the Commonwealth in federal court stating as grounds the Commonwealth's rights under the Eleventh Amendment and the lack of jurisdiction for want of diversity because a state is not a person. Five months later these motions were finally granted. At the same time motions were filed in state court seeking dismissal on grounds the circuit court lacked jurisdiction under Kentucky Constitution Sec. 231 and the Board of Claims Act (KRS 44.070 et seq.). These motions were also granted and the plaintiffs filed an appeal which culminated in the opinion they now complain of.

It is interesting to note that petitioners in their Statement of the Case make reference to:

"A comprehensive report concerning not only the factual cause of the fire but admitting negligence by certain state officials and other parties was released September 19, 1977. The report is entitled 'Investigative Report to the Governor,' and will hereinafter be referred to simply as the 'Report,' and illustrates the type of evidence that would be introduced at a trial against the Com-

monwealth. This report was introduced in the appeal to the Kentucky Supreme Court by the Appellants."

That report has never been introduced into evidence in any court nor could it be. It certainly is not a part of the record of this case. Further, the co-author of that report, acting under an Executive Order of the Governor and in contravention to the Rules of the Kentucky Supreme Court on the unauthorized practice of law, is now appearing as "Of Counsel" on petitioners' brief. Mr. Lewis's apparent conflict of interest as well as co-counsel's disregard for such conflict do nothing to enhance the image of the legal profession or add to their credibility in this case.

Mr. Lewis, as "special counsel" first takes part in respondent's investigatory process, then co-authors and edits a report of hearsay on hearsay and in the report offers an unfounded personal opinion as to the ultimate question of fact. He then affiliates with opposing counsel and proceeds to offer his report to this Court as proof of the position now taken. Fortunately, Mr. Lewis is not a member of the Bar of Kentucky.

REASONS FOR DENYING THE WRIT

The respondent Commonwealth of Kentucky respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Supreme Court of Kentucky's opinion in this case.

The issues raised by the petitioners in the Petition for Writ of Certiorari either were not presented to

the Supreme Court of Kentucky, do not present a substantial federal question or have been previously determined by this Court.

1. The Decision Below Rests on an Adequate and Independent Non-Federal Ground.

It is essential to the jurisdiction of the Supreme Court under section 1257 that a substantial federal question has been properly raised in the state court proceeding. "The jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a Federal right." *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655 (1897).

It is clear from page 4 of the Brief for Appellants' filed in the state court they did not assert any federal right other than equal protection and due process of the

¹The outline of our argument is as follows:

- I. Except for the doctrine of sovereign immunity, there is no doubt that the state, along with others, would be liable to these plaintiffs.
- II. The doctrine of governmental immunity, at least under the facts in this case, is obsolete under modern principles of jurisprudence, and ought to be abrogated by this Court.
- III. The doctrine of sovereign immunity violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.
- IV. The doctrine of sovereign immunity violates procedural due process, as established by the Fourteenth Amendment to the Constitution of the United States.
- V. The doctrine of sovereign immunity violates substantive due process as established by the Fourteenth Amendment to the Constitution of the United States, and the rights reserved to the people under the Ninth Amendment to said Constitution.

14th Amendment. Petitioners had every opportunity before the state court both in their brief and petition for rehearing to raise the federal constitutional issues now raised but failed to do so.

The decision below was based on established substantive state law. "Public duty doctrine" was the grounds for dismissal of the City of Southgate and was an issue on appeal. Cf. *City of Louisville v. Louisville Seed Co.*, Ky., 433 S. W. 2d 638 (1968); *Frankfort Variety Inc. v. City of Frankfort*, Ky., 552 S. W. 2d 653 (1977). Insofar as this respondent is concerned, the initial briefs presented only the jurisdictional question related to sovereign immunity.

The Court's opinion dealt largely with its analysis of state substantive law pertaining to the public duty doctrine. It then held that even if sovereign immunity were not to exist, the public duty doctrine would, in any event, apply to the Commonwealth of Kentucky. This decision, not based on any federal claim, but rather on the Commonwealth's substantive tort law, is clearly an independent non-federal ground. *Fay v. Noia*, 372 U. S. 391 (1963).

Petitioner's petition for writ of certiorari must be denied on the foregoing argument.

II. The Application of the Public Duty Doctrine by the Kentucky Supreme Court to the Commonwealth of Kentucky Is Not Violative of the Equal Protection and Due Process Provisions of the United States Constitution.

Contrary to what is urged by petitioners, it has been well settled since the case of *Palmer v. Ohio*, 248 U. S. 32 (1918) that the question of state governmental immunity is not one for review by this Court. This Court has on at least four recent occasions, including *Huffman v. Kentucky*, 432 U. S. 991 (1978) either denied certiorari or dismissed appeals involving this issue. *Krause v. State*, 28 Ohio App. 2d 1, 274 N. E. 2d 321 (1971), reversed 31 Ohio St. 2d 132, 285 N. E. 2d 736 (1972), appeal dismissed sub nom. *Krause v. Ohio*, 409 U. S. 1052, 34 L. Ed. 2d 506, 93 S. Ct. 557 (1972), reh. denied 410 U. S. 918, 35 L. Ed. 2d 280, 93 S. Ct. 959 (1973); *Berry v. Hinds County, Mississippi*, 344 So. 2d 146 (Miss. 1977) cert. denied 434 U. S. 831; *Brown v. Wichita State University*, 217 Kan. 661, 538 P. 2d 713 (1975), reversed en banc on motion for rehearing 219 Kan. 2, 547 P. 2d 1015 (1976), appeal dismissed sub nom. *Bruce v. Wichita State University*, 429 U. S. 806, 97 S. Ct. 41, 50 L. Ed. 2d 67 (1976).

The arguments rejected by this Court in the direct appeal of *Huffman*, *supra*, for lack of a substantial federal question are almost identical with those now presented. The basic difference being the replacement of "sovereign immunity" with "Public Duty Doctrine." Respondent submits that if there was no substantial federal question in Kentucky's sovereign im-

munity doctrine, then there is none in its public duty doctrine.

Basic tort law consists of the traditional elements of Duty, Negligence, Proximate cause and Actual loss or damage. W. Prosser, *Law of Torts* p. 143 (4th ed. 1971). All of these elements must be present for there to be an actionable tort. Failure of one results in the collapse of the whole. *Illinois Central Railroad v. Vincent*, Ky., 412 S. W. 2d 874 (1967).

The Public Duty Doctrine in Kentucky, in its simplest way applies "duty to all, duty to none" to everyday tort law. Under the doctrine in Kentucky, the Court must as a matter of law determine whether the duty owed was to an individual or to the public. *Frankfort Variety, supra*. If it is determined that the duty owed was to the individual, the proceedings continue as to the other elements of an actionable tort. If it is determined as a matter of law that no duty existed, the case ends, for there is no actionable tort. As with any other question of law, the issue is appealable through the state court system.

This Court in *Palmer, supra*, stated:

"The rights of individuals to sue a state in either a Federal or a state court, cannot be derived from the Constitution or laws of the United States. It can only come from the consent of the state." 248 U. S. at 34.

In *Reed v. Reed*, 404 U. S. 71 (1971), wherein the equal protection clause was under discussion, the court stated:

"In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways . . ." 404 U. S. at 75.

Petitioners claim that a new class of victim has been created by the public duty doctrine. The public duty doctrine does not create any new class of victim. The four basic elements of tort law must be present for all victims of a tort, whether the alleged tort-feasor is the Commonwealth of Kentucky, the United States of America or a private citizen. As before, any claim against the Commonwealth must be made in the Board of Claims, which is open to the claimant on the same conditions as to others in like circumstances and where the same rules of evidence and modes of procedures are available to those similarly situated. Persons who seek recovery in negligence against private tort-feasors are different from those who seek recovery for negligence against the Commonwealth. They are not similarly situated and may be treated differently. The petitioners are not denied the opportunity to seek recovery because of race or sex or financial status. The doctrine does not single out any discrete and insular minority or any group defined by immutable characteristics.

In support of their position, petitioners cite *Boddie v. Connecticut*, 401 U. S. 371 (1971). The ruling in *Boddie* is limited as the Court said:

"We do not decide that access for all individuals to the courts is a right that is, in all circumstances,

guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. *Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.*" 401 U. S. 382-383. (emphasis added).

This position was reemphasized in *United States v. Kras*, 409 U. S. 434 (1973). Kras contended, as do petitioners that his case fell squarely within *Boddie*. In rejecting Kras, the Court relied on the above statement. Respondent submits that *Boddie* does not support the petitioners.

Clearly, as shown above, the public duty doctrine as made applicable to the Commonwealth of Kentucky is not violative of the Fourteenth Amendment Equal Protection and Due Process Clauses of the United States Constitution and the Petition for Writ of Certiorari should be denied.

CONCLUSION

The petitioners have failed to establish any circumstances which would require certiorari to be granted in this case. No substantial federal question is presented and certiorari should be denied.

Respectfully submitted,

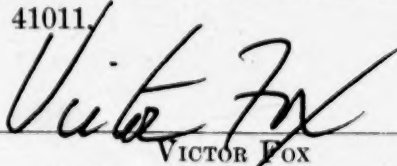
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CERTIFICATE OF SERVICE

I, Victor Fox, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioners by depositing three copies of same in the United States mail, first class postage prepaid, on July 23, 1979, addressed to counsel for petitioners, Hon. Stanley M. Chesley, Waite, Schneider, Bayless & Chesley, 1318 Central Trust Tower, Cincinnati, Ohio 45202; Hon. Thomas C. Spraul, Spraul & Reyring, 505 Gwynne Building, Cincinnati, Ohio 45202; and Hon. William D. Hillmann, 120 E. Second Street, Covington, Kentucky 41011.

A handwritten signature in dark ink, appearing to read "Victor Fox", is written over a horizontal line.

VICTOR FOX

Assistant Attorney General